

**Before the  
MONTGOMERY COUNTY  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

Larry and Kate Decker,  
Complainants

v.

CCOC Case No. 19-11  
September 20, 2012

Kingsview Village Homeowners Association,  
Respondent

**DECISION AND ORDER**

(Before Hitchens, Brandes, Farrar)

The above-captioned dispute came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland (CCOC) for a hearing on January 18, 2012, pursuant to Chapter 10B of the Montgomery County Code. The Complainants were *pro se*, and the Respondent was represented by counsel at the hearing. Based on the parties' evidence and argument, and the record herein, the Panel finds, concludes, and orders as follows.

**I. Background**

The Complainants are co-owners of an improved lot which is a part of the Respondent association. They filed a complaint with the CCOC on May 9, 2011, disputing the Respondent's conclusion that they were in violation of the architectural rules of the community by removing the shutters from their home. They claimed that the shutters were purely decorative and not an important feature in the overall design scheme of the community. The Respondent disagreed, claiming that its determination to preserve the original appearance of the community was within the authority of its board of directors and that the board had good cause for its decision. The Respondent, as part of its answer, included a "counter request" seeking affirmative relief, namely, that the CCOC find the Complainants in violation of the governing documents, that it order the Complainants to replace the shutters, and that it award attorneys fees. The parties unsuccessfully attempted to resolve the dispute in mediation, and the

CCOC voted to take jurisdiction of the dispute on November 2, 2011, and to assign it to this hearing panel for disposition.

The hearing lasted three hours. Both Complainants testified and offered photographs and other evidence; the Respondent also offered the evidence of two members of its Board of Directors who were involved in the dispute. At the conclusion of the hearing, the Respondent renewed its motion for an award of attorney's fees, which the panel took under advisement.

The hearing was conducted by a panel of two members, Mr. Brandes being unavailable. The parties agreed to let the hearing proceed on the understanding that Mr. Brandes would read the transcript and all evidence submitted at the hearing before participating in the decision. Mr. Brandes has certified that he has done so.

## **II. Findings of Fact**

The Panel finds the following facts:

1. The Complainants own and reside in 17820 Falconcrest Drive, Germantown. This lot is a part of the Kingview Village Homeowners Association, pursuant to a Declaration of Covenants filed in the land records of Montgomery County.
2. The community contains 713 homes constructed by different builders pursuant to a master plan created by the community's developer.
3. Many homes within the community were sold initially without shutters on them. It is not clear from the record whether shutters were required for any of the homes. The undisputed testimony does show that on some homes, at least, including the Complainants' home, shutters were an option but not mandatory. Some builders offered different types of shutters as well. The result is that many homes were originally sold with shutters, while others were not.
4. The Complainants agreed to purchase shutters as one of the options available to them from their builder, and the shutters were installed on the home as built.
5. The shutters installed on the homes within Respondent are purely decorative. They are not functional because they are screwed to the walls.
6. On at least some homes, including the Complainants', the shutters were attached to the exterior walls with plastic clips that were not durable and broke, allowing the shutters to hang loose or even to fall off the houses.

7. The Complainants purchased their home in 2000. In approximately 2006, one of the shutters on the home blew off and narrowly missed hitting one of their children, who at that time was 3 or 4 years old. Fearful of another incident like that, the Complainants removed all the shutters from their home, without seeking permission from the Respondent to do so.

8. In December, 2008, the Respondent sent written notice to Complainant asking them to replace the shutters, but Complainants deny receiving such a letter. Subsequently, in early 2011, the Respondent sent another written notice to the Complainants advising them that they had violated the governing documents of the Respondent by removing the shutters without permission. More notices and correspondence followed, and at the Complainants' request the Respondent's Board of Directors held a hearing on the matter with the Complainants in attendance on April 20, 2011. Following that hearing, the Board voted to hold the Complainants in violation and to order them to replace the shutters, and this dispute followed.

9. The Board found several other concurrent instances of unauthorized shutter removal in the community, and determined to require all the owners involved to replace the shutters.

10. The Respondent's rationale for requiring the Complainants to replace their shutters was a desire to preserve the appearance of the neighborhood as originally sold, and a concern about the possibility of creating a precedent by allowing the removal of shutters from homes that were originally sold with them. The Respondent believed that if too many homes removed their shutters, the overall appearance of the community would change.

11. At least one other member of the community, who was one of the Respondent's witnesses at the hearing, also had a problem with shutters becoming loose, and he was able to solve the problem by using metal screws to replace the plastic ones.

12. Article VIII, Section 1, of the Respondent's Declaration of Covenants, states in pertinent part that:

*[N]o building, fence, wall, or other improvement or structure shall be commenced, directed, place, moved, altered or maintained upon the Property, nor shall any exterior addition to or change . . . or other alteration thereupon be made until the complete plans and specifications showing the . . . proposed form of change. . . shall be submitted to and approved in writing as to harmony of exterior design, color and location in relation to surrounding structures . . . and conformity with the design concept of the community. . .*

13. At the time that the Complainants removed their shutters, the Respondent's rules and governing documents did not specifically mention "shutters" as one of the architectural matters regulated. After the Respondent became aware of the Complainants and others removing their shutters, it issued a warning in its newsletters that specifically mentioned shutters as a regulated feature.

### III. Conclusions of Law

1. At the outset, we must identify the legal standard of review that we must apply to this dispute. The Respondent, in its Answer, states that the proper standard is what is commonly called the "business judgment" rule. Citing *Black v. Fox Hills North Community Association, Inc.*, 90 Md. App. 75, 599 A.2d 1228 (1992), Respondent argues that "the Commission should not second guess the correctness of the Board of Directors' decision making or to substitute its opinion for that of the Board of Directors. Absent fraud or bad faith, the Commission is not permitted to overrule the Board of Directors' business judgment decision."

2. While the Respondent correctly states the rule, the rule is not applicable to this case. *Black v. Fox Hills North* did not involve a case similar to this, a case in which a homeowners association is attempting to enforce a decision against a member which limited that member's rights to use his property as the member saw fit. Instead, the homeowner in *Black* was complaining that his association should enforce its rules against *another* member who was not a party to the legal action. The Court of Special Appeals upheld the Board's decision not to take action against the other member.

3. The cases in which Maryland courts have applied the business judgment rule usually involve disputes over the management of the association's internal affairs. These cases have been extensively reviewed by another CCOC hearing panel in *Simons v. Fair Hill Farm Homeowners Association*, CCOC #66-09 (May 6, 2010). The *Simons* decision noted that in addition to the business judgment rule, the courts have also applied a "reasonableness" rule, the primary example of which is *Kirkley v. Seipelt*, 128 A.2 430 (Md. 1957). *Kirkley* dealt with a homeowner association's action to prevent a homeowner from installing metal awnings on the front of his home. The Court of Appeals held that:

any refusal to approve the external design or location [of heavy metal awnings]

. . . would have to be based upon a reason that bears some relation to the other

buildings or the general plan of development; and this refusal would have to be

a *reasonable* determination made in good faith, and not high-handed, whimsical or capious in manner.

*Id.*, 128 A.2d at 434 (emphasis added). Citing this case and others, the Panel concluded that the Court of Appeals "appears to be placing the burden on the party who seeks to enforce a property use restriction to justify its reasonableness."

4. The *Simons* panel noted two important differences between the business judgment rule and the reasonableness rule:

The distinction between the business judgment rule and [the] reasonableness standard is important: under the business judgment rule, an association's decision may be overturned only in cases of fraud, dishonesty, arbitrariness or bad faith; under the reasonableness standard, a court may overturn a decision simply if it is unreasonable.

A further distinction arises as to burden of proof. The business judgment rule clothes an entity's decision in a presumption of correctness, thus placing the burden on the complainant to plead and prove fraud, dishonesty, arbitrariness or bad faith . . . (citations omitted).

In contrast, the reasonableness standard appears to place the burden on the association whose decision is being questioned . . . (citations omitted).

In determining which standard to apply, the *Simons* panel summarized Maryland court decisions as holding that, "[t]he case law appears to turn on whether the decision under review directly affects a particular unit owner's economic or pecuniary interest." If the association's decision does not affect an individual's economic interest, the business judgment rule governs, but it does, then the reasonableness standard must be used.

5. This panel concurs with the analysis and reasoning of the *Simons* panel, and we conclude that the relevant standard of review is that of the reasonableness test, as defined by *Kirkley v. Seipelt*.

6. The Complainants claim that the Respondent's decision does not have a reasonable basis. They point out that the shutters are purely decorative, not functional; that they were offered as an option by the builders, not required; that many homes in the community were built without them so that the community

does not present a uniform appearance in this respect; that the governing documents did not specifically include shutters in the list of architectural matters regulated; that the shutters do not affect the value of the homes; and that the shutters are improperly installed and potentially dangerous to the residents of the community. Essentially, they argue that the shutters are not an essential component of the overall design and appearance of the community, and that therefore the association's decision to maintain shutters is purely a matter of subjective personal preference, without a reasonable or objective foundation.

7. The Respondent concedes some of the Complainants' claims, but not their conclusion. The Respondent argues that, whether optional or not and whether functional or not, the shutters were a component of the overall design plan for the community. The Respondent states that it is empowered to preserve the original appearance of the community. Contrary to the Complainants' claim that the decision to preserve shutters has no reasonable basis, the Respondent argues that there is no persuasive reason not to enforce the covenants and to permit alterations, at least in this case. The Respondent argues that if it permits the Complainants' application to remove their shutters, it will have no good reason to reject the next application to remove shutters, and gradually the appearance of the community will change as more and more homeowners remove their shutters.

8. We agree with the Respondent. The fact that the shutters are not functional, and cannot be shown to add any value to the home, does not lessen their importance as a significant component of the overall appearance of the community. The same could be said for the color of paint on the homes. While paint itself has the important function of preserving the exterior of a dwelling, that function is not dependent on the color of the paint, and a flat black paint will protect the home just as well as a gloss white or satin gray. The Complainants themselves conceded at the hearing (Transcript at 47) that the Respondent had the right to control the colors of the paints used on the homes.

9. The fact that shutters may have been an optional feature offered by the builders is important, but not decisive. The fact remains that shutters were intended to be one of the components of the overall design of the community, and that the community, as originally sold, contained a blend of homes with shutters and without them, just as it contained a blend of paints and roof colors, as well as a mix of elevations and other design elements.

10. It may well be that the shutters were not well installed and that the hardware used to secure them to the homes was not durable. However, this does not compel the removal of the shutters. The Respondent has grounds for its position that the shutters can be securely reinstalled with the proper hardware.

11. The Complainants also argue that at the time they removed the shutters, the governing documents did not explicitly define shutters as a regulated item. However, Article VIII, Section 1, of the Declaration of Covenants is sufficiently broad to include shutters by implication, because it clearly forbids any alteration of the homes without permission, and the addition or removal of shutters will affect the appearance of a home. The same reasoning was applied by the Court in *Kirkley v. Seipelt*, where the Court upheld the association's decision not to permit the installation of awnings even though the association's covenants did not specifically mention awnings as a regulated item. The addition of awnings could affect the overall appearance of the community, and the association's documents gave it the right to preserve the community appearance.

12. We conclude that the Respondent had a reasonable basis for its decision. While Respondent could have allowed the removal of the shutters as being consistent with the overall appearance of the community, it was not required to do so. Respondent was acting to preserve the original appearance of the community. This rationale is consistent with preserving the appearance of the Complainants' home in relation to other homes and to the overall design plan of the community, and thus meets the reasonableness standard of *Kirkley v. Seipelt*. We therefore hold that the Respondent's decision was valid and will be upheld.

#### **IV. Request for Attorney Fees**

1. The Respondent has requested \$11,778.00 in attorney's fees.

2. Under Section 10B-13(d) of the Montgomery County Code, we may award attorney's fees if we find that the other party has engaged in some sort of "misconduct" while the dispute was pending before the CCOC, or "if an association document so requires and the award is reasonable under the circumstances." The Respondent does not claim that there was any actionable misconduct by the Complainants. Instead, it bases its motion on the Respondent's governing documents, specifically Article XIV, Section 3, of the Declaration of Covenants, which in pertinent part states:

Enforcement of these covenants and restrictions shall be by any proceeding at law or in equity against any person or persons violating or attempting to violate any covenants or restrictions, either to restrain or enjoin such violation or to remove such violation or to recover damages or all of the foregoing . . . all at the cost of the owner in violation, both as to court costs and reasonable attorneys fees . . ."

3. Although the Respondent did not initiate this complaint to enforce its covenants, the issue of the validity of the Respondent's decision holding the Complainants in violation is the core of this dispute; the Respondent in its answer

defended the validity of its decision, and requested that the Commission uphold its decision and order the replacement of the shutters. The Respondent's defense is in effect the equivalent of an action to "remove [a] violation."

4. Section 10B-13(d) further mandates that for the CCOC to award attorneys fees, the association document must "require" payment of attorneys fees. The document here states that enforcement "shall" be performed through a legal action "all at the cost" of the owner in violation. We conclude that the language quoted requires the owner in violation to pay the association's court costs and attorney's fees.

5. Section 10B-13(d) also states that attorneys fees must be "reasonable under the circumstances." We believe that this means the panel should apply the standards enunciated by the Court of Appeals in *Monmouth Meadows Homeowners Association v. Hamilton*, 416 Md. 325, 7 A.3d 1 (Md. 2010). That case involved the calculation of attorneys fees for collecting assessments pursuant to a contract (namely, the governing documents) that allows for an association to levy such fees against defaulting members.

6. Although this case does not involve the collection of assessments, it does involve the issue of attorneys fees being imposed by virtue of a contract between the association and its members. The *Monmouth Meadows* Court held that the proper tool for the calculation of reasonable attorneys fees is Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct. That Rule requires consideration of these factors:

- (a) the time and labor required, the novelty and difficulty of the issues, and the level of skill required to perform the legal service properly;
- (b) the likelihood that the attorney will not be able to accept other work;
- (c) the customary fee charged in the locality for similar work;
- (d) the amount of money involved in the dispute and the results obtained
- (e) time limitations, if any,
- (f) the nature and length of the attorney's relationship to his client;
- (g) the experience, reputation and ability of the attorney; and
- (h) whether the fee is fixed or contingent.

The *Monmouth Meadows* court noted that although the attorney's fee agreement with the client can be considered, it is not decisive, and a reviewing court must apply the above factors.

7. Applying the standards enunciated in *Monmouth* and the first of the applicable factors listed in Rule 1.5 (the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly), we must find that the total attorneys fee sought is not reasonable under the circumstances. The basic legal principle in this case – the right of an Association to enforce its written rules on architectural changes – is



one of the most common issues arising in disputes between homeowners and homeowners associations. The case law establishing the standards for review and determination of such disputes by a court or quasi-judicial body such as the CCOC are settled, well-established and widely known by both attorneys and real estate management professionals. In addition, the relevant facts were not in dispute, and the operative language in the Association's governing documents was not unusual. In the panel's view, the only nuance in this matter involved whether since the shutters were originally an *optional* feature offered by the builder of the home, that circumstance altered Complainants' obligation to obtain approval for a change to the original façade; this issue was resolved by review of the governing documents and the application of common legal principles. Both the mediation session and the CCOC Hearing Panel process were relatively informal and straight forward. For experienced counsel, the instant case can only be characterized as "routine".

8. We must also consider whether accepting this case precluded other employment, the implication being that an attorney's fee could reflect such opportunity costs. No information on this issue has been provided. We note that Respondent's attorney appears to have an on-going relationship with the Respondent based on hourly rates that it establishes with the Respondent, and dedicates several attorneys to be available for community association legal services.

9. The third factor is the fee customarily charged in this jurisdiction for similar services. Counsel has not provided information on how its rates compare to other firms in the County. Based upon this panel's experience with fees customarily charged for covenant enforcement litigation, and upon the billing rates submitted, the panel concludes that the fees are at the high end of the range of reasonable rates charged for similar services in the County.

10. The fourth factor is "the amount involved and the results obtained." Neither party sought a money judgment. As the Court wrote in *Monmouth Meadows*, "[w]hile there are circumstances in civil cases where the cost of proceedings can exceed the principal amount sought, there must be a reasonable relationship to the amount involved," *id.*, 416 Md. at 337, 341; 7 A.3d at 8, 11. While we recognize that there is an intangible value to the principle of enforcing the association's documents and preserving the good appearance of the community which cannot readily be measured in dollars, we also recognize that the violation here was relatively minor, purely cosmetic, and did not involve health or safety or inconvenience to other members. Although the decision of the Respondent and its counsel with regard to how much it was willing to spend on this matter is within their discretion, such a decision must also be made in the context of a realistic expectation of what a Court or the Commission would determine was a reasonable fee to impose on the Complainants.

11. We must consider the "time limitations imposed by the client or by the circumstances." Respondent does not show, and we are not aware of, any such limitations in this case.

12. We must consider "the nature and length of the attorney's professional relationship with the client." We have not been given any information on this matter.

13. We must consider "the experience, reputation, and ability of the lawyer performing the services." The primary attorney, Mr. Jason Fisher, is highly regarded as a leader in Maryland community association law and practice. Mr. Tucker and Ms. Katz are also well-regarded for their competence and achievements for clients.

14. Finally, we must consider whether the fee is fixed or contingent. It appears from our review of the billing records that the fee is based on a flat hourly rate.

15. In reviewing the detailed description of hours and tasks billed to the Respondent, we can categorize the work into three primary categories: (i) responding to the complaint; (ii) preparing and participation in the mediation; and (iii) preparing for and attending the hearing.

*(i) Responding to the complaint:* All three attorneys charged time to this task, including some time charged by Ms. Katz that was not billed for. The involvement of several attorneys necessarily entails coordination of their efforts and communication among themselves, but ultimately, the response was Mr. Fisher's pleading, and the panel's view is that it is fair and reasonable to award the charges attributable to him, but that the involvement of Ms. Katz and Mr. Tucker was not primarily for the Respondent's benefit, but for Counsel's convenience and administrative purposes. The Panel therefore awards the charges for Mr. Fisher's time on this task in June 2011, in the amount of **\$1058.50** for the 2.9 hours he spent on this task.

*(ii) Preparing for and attending mediation:* The panel awards the charges for Mr. Tucker's time on this task in August 2011, in the amount of **\$1225.50** for the 4.3 hours spent on the task.

*(iii) Preparation for and attending the hearing* The panel awards the charges for Mr. Fishers time on this task in November, 2011 and January 2012 with the following reductions. The time spent on January 5, 10, and 12 to review issues and prepare witness testimony for the hearing is reduced from 4.7 to 3.0 hours, in light of the time also charged on November 16 for similar review and meeting with the Board. The time spent on January 13 to prepare the Respondent's memorandum of law and meet with clients to prepare them for hearing is reduced from 6.7 hours to 4.0 hours in light of the fact that the

memorandum largely reiterates the case law submitted in the Respondents response to the complaint regarding the business judgment rule, waiver of enforcement of covenants, and attorneys fees. The panel also awards \$1520.00 for Mr. Fisher's participation in the hearing, being 4 hours at \$380 per hour. (The firm's invoice reflects a current hourly charge of \$380, not \$385 as indicated in Mr. Fisher's affidavit.) Thus the award on this task is **\$5434.00**

16. The panel also awards **\$129.92** in expenses.

17. The total award is **\$7847.92**.

## **V. ORDER**

Accordingly, it is this 20th day of September, 2012, ORDERED as follows:

1. Within 30 days after the date of this Decision, the Complainants shall either replace all of the shutters they removed from their home back in their original locations or, if those shutters are no longer available, select new shutters and submit an architectural change application describing the proposed shutters to the Respondent; and,

2. Within 30 days of the Respondent's approval of a shutter design, the Complainants shall install the approved shutters; and,

3. Within 90 days after the date of this Order, or such other time as the parties may agree upon, the Complainants shall pay to Respondent the sum of **\$7847.92** as its costs and reasonable attorneys fees in this dispute. If Complainants fail to pay this sum, the Respondent may proceed to collect it pursuant to any means authorized by its governing documents or by applicable law.

Any party aggrieved by this Decision may file an appeal to the Circuit Court for Montgomery County within 30 days after the date of this Decision as provided by the Rules of Court for Appeals from Administrative Agencies.

Commissioners Farrar and Brandes concur.

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Christopher Hitchens, Panel Chair

